IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 731 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH
and
Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAVALSINH BHIKHUBHA @ BHAGWATSINH ZALA
Versus
STATE OF GUJARAT

Appearance:
MR KB ANANDJIWALA for Petitioner
MR SP DAVE APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH
and
MISS JUSTICE R.M.DOSHIT

Date of decision: 06/04/2000

ORAL JUDGEMENT

This appeal arises from the impugned judgment and order dated 12th July, 1990, rendered by the learned Additional Sessions Judge, Surendranagar, in Sessions Case No. 27/89. The present appellant, who has been referred to as the accused hereafter, has been convicted and sentenced for life imprisonment under section 302 of the Indian Penal Code (IPC for short) as also under section 324 of the IPC resulting into sentence of SI for one year. He has also been directed to pay fine of Rs.2000/- for the main offence, out of which, Rs.1500/are directed to be paid to the heirs of the deceased in respect of offence under section 302 of the IPC. He has been directed to pay fine of Rs.500/- for the same being paid over by way of compensation to the complainant who sustained injury during the course of the occurrence.

The facts as per the complaint given by Babbhai Motabhai - brother of the deceased Bharatbhai, may briefly be stated -

The complainant has been staying with his mother and brother at village Pajvali (Panjvani). He and his elder brother Bharatbhai reached Chotila at around 9-00 O'clock in the morning of 18th December, 1988, for going to village Mevasa. They had their tea at the tea-stall of one Devshi Ruda. On inquiry, they came to know that there was some time left for the bus for village Pajvali to arrive. They, therefore, went near the barber's shop situated across the bus stand beyond the road. It was at around 12-00 Noon when the accused ran from behind the cabin (probably the barber's cabin) and gave a knife blow on the stomach portion of the complainant's brother Bharatbhai, and immediately thereafter rushed to the complainant and gave a knife blow on the complainant's back. The accused then escaped running towards the town via bus-stand. The injury sustained by Bharatbhai resulted into his intestine coming out and Bharatbhai falling on to the ground. He had, therefore, taken Bharatbhai in rickshaw to Chotila Referal Hospital. He was accompanied with Manglubhai Babbhai, where the Doctor declared Bharatbhai dead and gave treatment to the complainant. According to the say of the complainant, there were previous occasions of quarrel between the accused on one side and the complainant and the deceased on the other side, and there were cross cases registered against each other. The said cases were settled. But keeping the enmity on account of such previous incidents, the accused killed his brother and injured him. PSI Mr. Gohil registered the offence at the complaint of Babbhai and investigated the case, drawing necessary panchnama

and recording the statements of the witnesses, as also effecting recovery, taking possession of the blood stained clothes of the deceased and blood stained earthen portion from the place of incident, and discovering the muddamal knife and sending them for scientific examination. Finally, after receiving the necessary reports including Postmortem report, report of the scientific examination of the muddamal article,, the Investigating Officer submitted chargesheet which resulted into the accused facing the aforesaid sessions case before the learned Additional Sessions Judge. His was the case of denial at the trial. Upon appreciation of the evidence which was adduced by the prosecution and after hearing the learned counsel, the learned Additional Sessions Judge rendered conviction and sentence as aforesaid.

The prosecution examined the following witnesses at the trial :

(1) PW-1 Dr. Rajashree Rasiklal, Ex-8 had an occasion to perform postmortem on the dead-body of Bharatbhai. There was one stab wound on abdomen 4 cm C Mesonty Protruded, resulting into death on account of shock due to internal hemorrhage. She has deposed that blood was collected in the adbomen cavity. She has also noted internal injuries. She has, however, not been examined with regard to the nature of injury sustained by the complainant though he had an occasion to examine him also. She could not be recalled as witness for that purpose as she was reported to be out of India at the relevant point of time. Postmortem note has been placed at Ex.9 as a result of the evidence of this witness.

(2) PW-2 Dr. B.D.Solanki, Ex-12 has been examined for the purpose of ascertaining of the blood group of the accused.

(3) PW-3 Bharat Dadbhai Ex-15, has turned hostile to the prosecution.

(4) PW-4 Nagarbhai D. Parmar, Ex-16, he being Deputy Mamlatdar and Executive Magistrate, had an occasion to record the Dying Declaration of the complainant, which in the form of narration appears at Ex.17. Ex-18 is the Yadi addressed to the Executive Magistrate.

(5) PW-5 Devji Karsan Ex-19, happens to be the barber running the hair-cutting saloon Opp-Chotila Bus-stand. He has turned hostile to the prosecution.

(6) PW-6 Raju Mesurbhai Ex-20 also has his cabin near Chotila Bus-stand adjacent to the cabin of the witness Devji Karsan. He has turned hostile to the prosecution.

(7) PW-7 Vithalbhai Ravatbhai Ex-21 is another cabin-holder, turning hostile to the prosecution.

(8) PW-8 Anopsinh Rupsinh Ex-22 has his four wheeler in which he has been running a tea-stall near Chotila Bus-stand. He has turned hostile to the prosecution.

(9) PW-9 Nirmalaben Devshibhai Ex-25, widow of Devshi Ruda had been running tea-stall near Chotila Tower on Anandpur Road. She has been examined to say that the complainant and his brother Bharat had been at the said tea-stall for taking tea in the morning on the day of the incident and they were accompanied with some third person looking 'Kathi'.

(10) PW-10 Dalpat Vishnu Ex-26 has his Pan-beedi cabin Opp-Chotila Bus-stand. He stood hostile to the prosecution.

(11) PW-11 Babulal Bhikhalal Ex-27 has his cycle repairing cabin near Chotila Bus-stand. He has also turned hostile to the prosecution.

(12) PW-11 (A) Daud Chandbhai Ex-28 has his pan cabin near Chotila bus-stand. He has not supported the prosecution.

(13) PW-12 Rafiq Yakub Ex-29 has his sweet shop near Chotila Bus-stand. He did not remain by the side of the prosecution.

(14) PW-13 Manglu Suringbhai Ex-30 happens to be distant maternal-uncle of the complainant and has supported the prosecution. His evidence will need consideration in this appeal.

(15) PW-14 Babubhai (Babbhai) Motabhai Ex-41 is the complainant. His evidence will also need consideration in this appeal.

(16) PW-15 Rupaji Nimaji Ex-48 happened to be Head-constable in Chotila Police Station at the relevant point of time.

(17) PW-16 Daudbhai Nazabhai Ex-51 is the Panch witness in respect of taking sample of earthen portion from the place of the incident where blood-stains could be noticed.

(18) PW-17 Hasmukh Kanaiyalal Ex.53 is the hostile panch witness in respect of discovery panchnama Ex.54.

(19) PW-18 Dilavarsinh Dilubha Ex-54-A who happens to be Police Constable in Chotila Police Station had an occasion to send the dead-body of Bharatbhai for postmortem.

(20) PW-19 Dharmendrasinh G. Gohil Ex-55 who was Incharge of the Police Station came to know at around 12-25 in the afternoon that there was exchange of hands between 'Garasiya' and 'Kathi-Darbar' of Chotila. He was sent for inquiring into the matter as the injured person was in the Hospital. He is the Investigating Officer.

(21) PW-20 Bhikhubha Jorubha Zala Ex-67 is Clerk of the Court in the Court at Chotila, who has been examined to depose with regard to he having received at 14-00 hours on 18th December 1989 the complaint Ex. 46 coupled with the annexures thereto.

The prosecution has placed on record the Postmortem Note at Ex.9, Dyeing Declaration of Babbhai Motabhai, he has however survived and he has been examined as prosecution witness No. 14 Ex-41, the sketch of scene of offence Ex-24, Inquest Panchnama at Ex-34, Panchnama with regard to search of the house of the accused and his uncle at Ex. 35 and Ex.36, Panchnama of clothes of the deceased Bharatbhai Ex-37, complaint at Ex-46, Panchnama of scene of offence, discovery of knife in question panchnama as well as arrest Panchnama Ex-54, report from Forensic Science Laboratory as well as serological report at Ex. 58 and Ex-59, Chotila Police Station CR Register No. 96/88, and Chotila Police

Station CR Register No. 110/88 at Ex. 62 and 63 respectively.

Mr. K.B.Anandjiwala, learned advocate appearing for the accused has taken us through the evidence which has been placed on the record of the sessions case. After making some effort with regard to the total exoneration of the accused from the incident in question, he ultimately concentrated upon the nature of the offence which can be attributed to the accused, and canvassed his submissions accordingly. In the first place, he referred to the evidence of all the aforesaid hostile witnesses who have consistently deposed that there was a quarrel between the accused on one side and the complainant and his deceased brother Bharatbhai on the other side. According to his submission, there ould hardly be any quarrel between the two sides unless they had occasion to communicate with each other. This circumstance which surfaces in the evidence of almost all the hostile witnesses viz. PW-5 Devji Karsan, Ex-19; PW-7 Vithalbhai Ravatbhai Ex-21; PW-8 Anopsinh Rupsinh Ex-22, PW-10 Dalpat Vishnu Ex-26; PW-11 Babulal Bhikhalal EX- 27 and PW-11(A) Daud Chandbhai Ex-28 has been canvassed in the first instance. According to his submission, this vital aspect is required to be kept before mental eyes when comparing the evidence of Babbhai Motabhai PW-14, Ex-41 and his distant maternal-uncle Manglu Suringbhai PW-13, Ex-30. We would, therefore, first take up evidence of Babbhai Motabhai. Narrating the incident as per the facts appearing in his complaint and noted hereinabove, this witness has deposed that the accused came from his tea-cabin located on the opposite side of the road when the witness and Bharatbhai were standing by the side of the barber's cabin where their distant maternal-uncle Manglu Suringbhai was being attended to for his shaving. Asking why the witness and his brother Bharatbhai had been there and abusing them on that score, the accused ran towards the brother of the witness Bharatbhai and gave a knife blow on his abdomen. At the same time, he also gave knife blow on the back of this witness. The accused immediately escaped running towards the bus-stand. This is in short the description of the incident given by the witness Babbhai Motabhai in his examination-in-chief. He has however admitted that there were cross complaints between the two parties around 3 to 4 months before the date of incident, cross cases of the offence punishable under section 324 of the IPC were lodged against each other. The witness so deposed for the purpose of saying that there was a case of previous

enmity between the parties, which resulted into accused assaulting the witness and his brother Bharatbhai. The witness however admitted that there was settlement between the parties in the aforesaid cross-cases. Infact, this aspect of settlement between the parties in the previous cross-cases has not been in dispute. It has appeared in the cross-examination of the witness that there was one murder trial in progress in the court at Rajkot against the witness at the time when his deposition was recorded. It has also appeared in his cross-examination that in one trial of murder against his brother (deceased) sentence of five years was imposed. That was a case of assault with spear. He has also admitted that his brother faced the case with regard to he having assaulted someone when he was on parole, and he and his deceased brother also faced the cases under the Arms Act. He has admitted that he faced cases under the Bombay Prohibition Act. He finally admitted that there were chapter cases against him and his brother. Mr. Anandjiwala drew our attention to this part of the cross-examination of this witness for showing a circumstance to the effect that the complainant and his deceased brother Bharatbhai were not the persons who could have been either under fear or apprehension from accused or any other person and that too in broad day light. This he submitted while saying that ensuing of quarrel between the two parties at the time of the incident would stand probablised from the nature of the persons who were involved in the incident. He, therefore, submitted that there was in fact altercation between the two parties at the time of the incident and that would have an effect of the accused taking out the knife and giving blows as stated above. Mr. Anandjiwala then reverted to further cross-examination of this witness on this very incident. The witness admitted that he tried to catch-hold of the accused when the accused gave the blow on his back. The witness admitted that while coming from his tea-cabin, the accused did not have knife in his hands, but he had taken out the knife while facing the witness and his brother Bharatbhai simultaneously while hurling abuses at them. He also admitted in his cross-examination that the accused did not give blow from behind the witness and Bharatbhai. He finally admitted that he tried to push back the accused during the course of the incident, but according to him, he did so to save himself from the assault of the accused. From this part of the evidence, Mr. Anandjiwala submitted that the incident occurred when the two parties had faced each other and obviously there was some quarrel between the two resulting into the altercation and probably exchange of hands and in that

process, possibility of the accused having taken out knife on the spur of a moment and given the knife blows one on the abdomen of the deceased and one on the back side of the witness can not be ruled out. If that be so, it can hardly be said that the accused assaulted and inflicted the knife blows with a intention to kill either Bharatbhai or the complainant. In order to further fortify his submission, Mr. Anandjiwala made reference to the sketch at Ex.24, which has been exhibited in the evidence upon consent of the parties. The sketch would indicate actual place of the occurrence in the midst of the road. On one side, tea cabin of the accused was located, and on the other side of it, barber's shop was located. The prosecution case, as can be seen from the evidence of the complainant, was that he and his brother were standing nearby the barber's shop (barber's cabin), whereas the actual place of incident is in the midst of the road. It would, therefore, appear that the complainant and his brother might be proceeding from the barber's cabin towards the bus-stand on the opposite side, nearby which the tea cabin of the accused was situated. Possibility of the two parties meeting in the midst of the road on some occasion is not ruled out in the background of the aforesaid set of prosecution evidence.

PW-13 Manglu Suringbhai EX-30 has been examined to lend support to the evidence of the complainant. Number of variations, contradictions and omissions have been high-lighted while reading his evidence. The manner in which the incident has been described by this witness is different from the manner in which the incident is described by the witness Babbhai Motabhai. According to this witness, the accused ran towards the complainant and his brother Bharatbhai while hurling abuses at them with the result that the complainant and his brother Bharatbhai ran to escape towards the bus-stand and in that process the accused gave knife blow from behind Bharatbhai and gave blow on the back of the complainant-Babbhai Motabhai. The manner of occurrence of the incident appears to have undergone change so far as the evidence of this witness is concerned. In his cross-examination, he admitted the omission with regard to his deposition that the accused ran from behind Bharatbhai and gave knife blow on his stomach. He, however, clarified that he stated before the police that Bharatbhai was following him (complainant) and the accused gave him knife blow as stated above. He has also been confronted with his omission with regard to the sudden appearance of the accused while speaking abuses when he was about to come out of the barber's shop as the

shaving work was about to be over. Mr. Anandjiwala finally referred to the admission of the witness with regard to this witness also having faced a charge of having committed murder of one Koli of Botad 4-5 years before the date of the incident.

In our considered opinion if the evidence of both the aforesaid witnesses is appreciated in true perspective, bearing in mind the circumstances which have been canvassed by Mr. Anandjiwala and bearing in mind the actual place where the incident occurred, the possibility of quarrel ensuing between the two parties in the midst of the road can not be ruled out. In the same manner the possibility of the accused having taken out the knife on the spur of a moment and given blows as aforesaid, also can not be ruled out. If that is so, the prosecution can not be said to have established beyond reasonable doubt the appearance of the accused at the scene of offence with an intention to kill either Bharatbhai or his brother complainant Babbbai Motabhai. Taking out knife during the course of the incident is indicative of the fact that something must have happened provoking the accused or compelling the accused to bring out knife and assault the rival party with that weapon. In our considered opinion, under such circumstances, this can not be said to be a case of pre-meditation for applying clause (4) of section 300 of the IPC. The case would obviously be covered under section 304 of the IPC. Number of decisions of the Apex court in that respect have been referred to. A couple of them might be noted. First one is in the case of JAGRUP SINGH VS STATE OF HARYANA (AIR 1981, SC, 1552), and the second one is in the case of THOLAN VS STATE OF TAMIL NADU (AIR 1984, SC 759). However, Mr. S.P.Dave, the learned APP submitted before this court that it has not been pointed out that the complainant and his brother Bharatbhai were armed with weapons. There is no case of accused having sustained any injury. True it is, yet the possibility of a quarrel ensuing between the two parties in the context of the earlier cross-cases and possibility of the accused taking out the knife seeing two persons of the other side facing him, can not be ruled out. The prosecution evidence appears to be deficient regarding requisite intention so as to bring the case within the four corners of section 300 of the IPC and not any of the exceptions thereto. We have gone through the decision of JAI PRAKASH STATE VS (DELHI ADMINISTRATION) {1991} 2, SCC, 32, which in turn has referred to VIRSA SINGH VS STATE OF PUNJAB (AIR 1958, SC 465). It clearly appears that in the respective cases, the Apex court took into consideration the circumstances in which the particular

incident occurred. One of the circumstances for consideration in Tholan's case (supra) and other cases was sudden quarrel. Present is also a case where the sudden quarrel having ensued between the two parties in the context of the previous incidents can not be ruled out. In our considered opinion, therefore, even bearing in mind the ratio in Virsa Singh (supra), the application of section 304 of the IPC can not be ruled out.

In the result, the conviction and sentence of the accused under section 302 of the IPC deserves to be altered to one under section 304 of the IPC. To that extent, this appeal is required to be partly allowed.

This appeal is partly allowed. Conviction of the accused Navalsinh Bhikhubha alias Bhagwatsinh Zala, under section 302 of the IPC is hereby altered to one under section 304 of the IPC. The sentence of life imprisonment which has been awarded for the said offence is altered to one undergone (which is nearly 11 years). However, sentence of fine and direction in that respect issued by the learned Additional Sessions Judge is hereby maintained. Conviction and sentence under section 324 of the IPC is also maintained while directing that the sentence of imprisonment awarded by the learned Additional Sessions Judge will stand included in the sentence undergone. However, sentence of fine will stand. The accused - appellant is directed to deposit in this Court the fine amount of Rs.2500/- (inall) as directed by the learned Additional Sessions Judge. Office to accept the same during the course of the day.

Upon deposit of the said amount of fine, the same shall be transmitted to the trial Court for the same being apportioned as directed by the learned Additional Sessions Judge.

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JOSHI